

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>GARY K. EMERSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,732
<b>NATIONAL MILLS, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>NATIONAL UNION FIRE INSURANCE</b>	)	
Insurance Carrier	)	

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<b>GARY K. EMERSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,733
<b>CASTLEGATE INDUSTRIES, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>LUMBERMENS UNDERWRITING ALLIANCE )</b>		
Insurance Carrier	)	

**ORDER**

**ON** the 14th day of June, 1994, the application of the respondent, Castlegate Industries, Inc., for review by the Workers Compensation Appeals Board of a Preliminary Hearing Order entered by Administrative Law Judge John D. Clark, dated May 2, 1994, came on for oral argument.

**APPEARANCES**

Claimant appeared by and through his attorney, Carlton Kennard of Pittsburg, Kansas. Respondent, National Mills, Inc. (National Mills), and its insurance carrier, National Union Fire Insurance, appeared by and through their attorney, John Rathmel of Overland Park, Kansas. Respondent, Castlegate Industries, Inc. (Castlegate), and its insurance carrier, Lumbermens Underwriting Alliance, appeared by and through their attorney, Denise E. Tomasic of Kansas City, Kansas. There were no other appearances.

### **RECORD**

The record considered for purposes of this appeal consists of the documents filed with the Division of Workers Compensation in these docketed matters, including the transcript of Preliminary Hearing held on April 28, 1994, before Administrative Law Judge John D. Clark, and the exhibits attached thereto.

### **ISSUES**

In his Preliminary Hearing Order dated May 2, 1994, the Administrative Law Judge ordered medical paid, designated Dr. King as the authorized treating physician, and ordered temporary total disability benefits to be paid if claimant is taken off work. The Administrative Law Judge further found that he did not have authority to modify or set aside the Interlocutory Order entered by the Benefit Review Officer dated April 1, 1994.

From this Preliminary Hearing Order, the respondent, Castlegate, filed an Application for Review before the Appeals Board raising the following issues:

- (1) Whether claimant's alleged accidental injury arose out of and in the course of his employment with the respondent, Castlegate.
- (2) Whether timely notice was given pursuant to K.S.A. 44-520.
- (3) Whether the Administrative Law Judge exceeded his jurisdiction in denying request of the respondent, Castlegate, to modify the Interlocutory Order entered by the Benefit Review Officer dated April 1, 1994.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

- (1)(2) The first two issues raised by the respondent in its Application for Review in reference to whether claimant has suffered an accidental injury which arose out of and in the course of his employment and whether timely notice was given, are issues, if disputed, that are considered jurisdictional and subject to review by the Appeals Board. K.S.A. 44-534a(a)(2).

After a review of the whole record, the Appeals Board, affirms Administrative Law Judge John D. Clark's Preliminary Hearing Order dated May 2, 1994, as it relates to the ordering of medical benefits paid, authorizing a treating physician, and ordering temporary total disability benefits if claimant is taken off work.

Claimant has presented by preponderance of credible evidence that it is more probably true than not true that the claimant sustained an accidental injury that arose out of and in the course of his employment and that timely notice was given of such accidental injury to respondent, Castlegate.

Claimant alleges in Docket No. 186,732, that he sustained work-related accidental injuries while employed by the respondent, National Mills, by a series of accidents from January 1993 through August 14, 1993. He also asserts in Docket No. 186,733 that he sustained work-related accidental injuries from August 16, 1993 through November 5, 1993, while employed by the respondent, Castlegate. The alleged injuries are repetitive use injuries to the claimant's upper extremities.

Claimant commenced working for the respondent, National Mills, on March 30, 1992, as a chemical room attendant. His job duties required him to repetitively use his upper extremities to fill buckets of liquid chemicals by opening and closing handles, filling buckets with powdered chemicals by scooping from 55-gallon drums and carrying the buckets to mix tanks. Claimant first noticed pain in his right elbow and wrist sometime in January 1993. In either April, May or June of 1993, the claimant lost control of a 100-pound bag of salt that he was lifting and while attempting to catch the bag, his right arm was twisted to the outside causing him pain and discomfort. After this incident, the claimant notified his night-shift supervisor concerning his problem with his right arm and an accident report was completed. While employed by National Mills, the claimant did not miss any work and did not seek medical treatment for his right wrist and elbow problems. On August 14, 1993, he left the employment of National Mills because of a change in working hours to a four-day, ten-hour per day workweek.

Just two days after he left the employment of National Mills, he commenced working at Castlegate on August 16, 1994. His job duties at Castlegate consisted of performing assembly work which required him to place hollow aluminum door frames in a mold, fill the frames with foam, and clean excess foam from existing holes in the door using a grinder. In order to complete these different job requirements, the claimant was required to perform fine dexterous movements with the fingers and repetitive movements with his hands, wrists, and elbows.

Claimant notified his night-shift supervisor and his foreman at Castlegate that he was having continuing problems with his upper extremities. He left the employment of Castlegate on November 5, 1993, because of increased pain in his right arm and hand. Claimant's symptomatology had accelerated during the performance of his job duties at Castlegate.

On November 9, 1993, the claimant sought medical treatment on his own with Dr. Koehn, his family physician who also is Castlegate's company physician. Dr. Koehn referred the claimant for an EMG test which was normal. Dr. Koehn's diagnosis was tendinitis of both wrists. Non-steroid anti-inflammatory medication was prescribed which was not helpful. Dr. Koehn released the claimant from treatment indicating that he needed to see a specialist for his continuing problems.

At the request of claimant's attorney, Bernard M. Abrams, M.D., a neurologist, examined the claimant on February 15, 1994. He diagnosed overuse syndrome with bilateral tendinitis secondary to repetitive motion related to the conditions of claimant's previous employment. Anti-inflammatory medication was prescribed and, if no improvement, trigger point injections were recommended.

At the time of the preliminary hearing of April 28, 1994, the claimant was not employed and had only worked some odd jobs since he had left his employment with Castlegate on November 5, 1993. Claimant was continuing to have symptomatology in his right upper extremity and similar symptoms in his left upper extremity since he left the employment of Castlegate.

For preliminary hearing purposes, the Appeals Board finds that the testimony of the claimant is credible and persuasive and supplemented by the medical reports admitted into evidence all of which taken together establishes that the claimant sustained a work-related accidental injury while employed by the respondent, Castlegate. The claimant's uncontradicted testimony also further establishes that he notified Castlegate of his work-related injury as required by K.S.A. 44-520.

(3) After a Benefit Review Conference was held in which both of these docketed matters were consolidated for hearing, the Benefit Review Officer, in an Interlocutory Order as permitted by K.S.A. 44-5,114(e), ordered Lumbermens Underwriting Alliance, the insurance company for the respondent, Castlegate, to pay 100% of the workers compensation benefits ordered paid in these two dockets until the final conclusion of the matters.

Castlegate and its insurance carrier Lumbermens Underwriting Alliance requested the Administrative Law Judge at the preliminary hearing to modify or set aside the Interlocutory Order of the Benefit Review Officer contending that he exceeded his statutory authority by entering the order. Administrative Law Judge Clark refused to change the Interlocutory Order citing K.S.A. 44-5,114(e) which authorizes the Benefit Review Officer to issue an Interlocutory Order directing each of two or more insurance carriers to pay a proportionate share of benefits due pending a final decision on liability.

The respondent, Castlegate, and its insurance carrier, Lumbermens Underwriting Alliance, in their Application for Review before the Appeals Board, allege that the Administrative Law Judge exceeded his jurisdiction when he denied their request to modify or set aside the Interlocutory Order.

K.S.A. 44-534a(a)(1) provides for the employee or employer to make application for a preliminary hearing on issues of the furnishing of medical treatment and payment of temporary total disability compensation. This Interlocutory Order is a dispute as to which of two insurance carriers is liable for payment of compensation for two compensable injuries. The Administrative Law Judge is given statutory authority under the preliminary hearing statute to make decisions on issues of providing medical treatment and temporary total disability benefits for the claimant. Accordingly, the Administrative Law Judge did not exceed his jurisdiction in making the decision that he did not have the authority to change this Interlocutory Order of the Benefit Review Officer.

As the Administrative Law Judge did not exceed his jurisdiction, the Appeals Board does not have jurisdiction pursuant to K.S.A. 44-551(b)(2)(a) to review this issue in the Preliminary Hearing Order.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge John D. Clark, dated May 2, 1994, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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